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NOTES ON THE EARLY JURISPRUDENCE OF MAINE.

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Our last number completed the catalogue of attorneys who had taken up their residence in Maine prior to, and during, the revolution. At its close, another wanderer from Cape Cod, Daniel Davis, the late solicitor general of Massachusetts, taking his substance upon his horse, and with the world all before him, came to Portland. He was born in Barnstable. Mr Otis very pleasantly tells us in his recent Barnstable letter, "that he assumed some little pretensions over his schoolmaster, in consequence of having been chief volunteer fifer to the Barnstable minute men:" it is not recorded that he prided himself upon this accomplishment after he came here. He studied his profession with Shearjashub Bourne, who is remembered for his talents and eccentricities by the scattered remnant of octogenarians who partook of his instructions. Of these Chief Justice Mellen is one and the late Judge Thacher another. When Mr Davis was in the zenith of his fame, Mr Bourne used to say, with great satisfaction, "I took special pains with Daniel."

He reached this remote spot in 1782, at which period Mr Frothingham was the only practising attorney in the county, and he was adding to the humble fruits which his profession yielded, such perquisites as could be derived from keeping a village school.

At the time Mr Davis arrived here there were but *five* lawyers in Maine, embracing the whole country from the Piscataqua river to New Brunswick. These were the late Judge Thacher, of Biddeford, John Frothingham, of Falmouth, Timothy Langdon, of Wiscasset, William Lithgow, of Georgetown, and Roland Cushing, of Pownalboro'. The latter was the youngest brother of Judge William Cushing and of Charles Cushing, who was the first sheriff of the county of Lincoln, and afterwards clerk of the supreme court, "for a time," as Mr Davis observed, "whereof the memory of man runneth not to the contrary." In 1828, Mr Davis remarked of himself, that he was the only survivor of the Maine bar, who lived in that country at the time he went into it, and again he says—we use his

own language—"As a specimen of the change in my time, I recollect that when I settled in Falmouth there was no settled minister of the gospel between that town and the British territories except in North Yarmouth, New Gloucester, Wiscasset, and, I believe, one in Townsend. There might have been one or two others, but if there were, I do not recollect them. I was going to say the *sheep* were without shepherds, but then there were no *sheep* but plenty of wolves all over the country."

Mr Davis continued in the practice of law in Portland with very distinguished success for more than twenty years. He owed his success to an easy, graceful elocution, and a wonderful aptness and facility in attacking the objections and evading the strong positions of his adversary. In 1796, he was appointed attorney of the United States for Maine district, was frequently chosen to represent the town in the house of representatives, and the county in the senate, at a time when it was some distinction to hold those offices. While discharging the duties of senator, in 1801, he was appointed to the office of solicitor general, then for the first time established. This station he occupied until the office was abolished in 1832. He moved to Boston in 1803 where he died at an advanced age in 1835.

The number of practitioners increased very slowly in Maine for several years after the revolution. A great depression remained at the close of the war, upon all branches of business, and a deeply seated prejudice had arisen against lawyers in Massachusetts and other parts of New England. This discouraged young men for a while from entering the profession. The excitement against gentlemen of the bar was countenanced and carried into the legislature in 1790, by a lawyer from Maine. John Gardiner, of Pownalboro', a barrister at law and a gentleman of some distinction, at the January session in that year, introduced a resolution, that the house would resolve itself into a committee of the whole, to take into consideration "the present state of the law and its professors in the commonwealth."

In his remarks on the subject he animadverted with great severity upon what he termed the abuses of the law and the practice of lawyers. He objected to associations of members of the bar, bar rules, modes of taxing cost, and other practices which he alledged were illegal and unwarrantable usurpations. He was opposed to special pleading and thought the law ought to be simplified. In the heat of debate he cast many aspersions upon the profession, which had a tendency to stimulate and strengthen the unfounded prejudices which were highly excited out of doors.

He procured bills to be introduced embodying his peculiar notions, but not having many supporters they were rejected by large majorities. The one to abolish special pleading was earnestly debated, and was opposed with great power and effect by the late Chief Justice Parsons, at that time but forty years old. The ability with which he resisted the wild attacks upon the existing system of jurisprudence, drew from Mr Gardiner, their author, the following eulogium: "This

erroneous opinion of the gentlemen of the profession here, was taken from a mere dictum of the late Mr Gridley, who, though a mighty pompous man, was a man of considerable learning and abilities—in learning and genius, however, almost infinitely inferior to that great giant of learning and genius, the law member from Newburyport."[1]

These illiberal prejudices against the profession gradually disappeared before the advancing light, which the moral and intellectual cultivation of the members of the bar was continually shedding upon the community. Perhaps no age of the world has presented a class of men more distinguished for ability, for soundness of intellect and purity of morals, than the legal profession in the age of which we are speaking. We have only to mention the names of the Cushings, Dana, the Lowells, the Sullivans, the Sewalls, Dane, Parsons, Gore, Ames, Thacher, Sumner, Bradbury, Paine, Dexter, Bigelow, Minot, Strong, Otis, Prescott, Tillinghast, Sedgwick, to illustrate our remark. It would seem impossible, that a profession which embraced such illustrious men could for a moment be subject to the odium of an enlightended people. We might, therefore, expect, as was the case, that the bar would grow in popular favor as long as its members should maintain the high intellectual and moral standard guaranteed by the men whose names we have cited. The vast increase of its numbers, has of course brought in many unworthy members, from whom a profession is often too apt to be judged by superficial observers. But the progress of legal learning has been advancing and there never has been a time when juridical science has been more faithfully studied and more ably and amply illustrated, both at the bar and on the bench, than the present.

Among the lawyers who came into Maine before the close of the last century, but who no longer occupy a place on the stage of action, we may record the names of Salmon Chase, William Symmes, Silas Lee, Isaac Parker, and Benjamin Orr. These all in their day, filled distinguished places in society and at the bar. Mr Symmes, when quite young, was a member from Andover of the convention of Massachusetts which adopted the federal constitution. He was a good lawyer and scholar : he died in 1807. But perhaps the most extraordinary of those men was Benjamin Orr ; he was brought up a house carpenter, and buildings in Portland now attest how well he discharged the duties of that occupation ; but, at maturity, he was stimulated by a powerful motive to become a lawyer, and with him to will was to do. He rapidly qualified himself for college, from which he was graduated in 1789, and after the usual preparatory studies in the office of Judge Wilde, he entered upon the brilliant career which crowned his unabated and meritorious efforts. He was the brightest ornament of the bar of Maine at the period of his death in 1828.

[1] Mr Gardiner had been educated in England, and practised law in the Island of St. Christopher. He came to Boston after the revolution and very soon moved to Pownalboro', in the neighborhood of which he had a large hereditary estate. He was lost by the upsetting of a packet, in which he had taken passage for Boston, in 1793 or '94. He left one daughter who married James Lithgow.

Silas Lee was a well read lawyer, and the numerous offices which he held at various periods are testimonials of his merit. He was graduated at Harvard College in 1784, studied his profession with Judge Thacher and established himself at Wiscasset. He was elected to congress in 1801 ; appointed district attorney for the United States in 1802, which office he held until 1815 ; he was appointed judge of probate in 1805, and chief justice of the common pleas in 1811.

We cannot forbear gracing our article with a more particular mention of the late Chief Justice Parker, who was for so many years an ornament of the bar and the bench. He was graduated at Harvard College in 1786, and after qualifying himself for practice in the late Judge Tudor's office, in Boston, he opened an office in Castine about the year 1790. His popular manners and the readiness with which he could apply his resources on any emergency, soon brought him into successful practice and general reputation. At the age of twenty-eight, he was elected to congress from the eastern district, but contemplating moving to Portland, in another district, he declined a re-election. In 1799, he was appointed by Mr Adams, marshal of Maine, which office he held until his removal by Mr Jefferson in 1804. In 1799 he delivered an eulogy upon the death of Washington, which was adorned with all the graces of elegant composition and added to his high reputation. Among the numerous students who availed themselves of the advantages which his office furnished, to acquire a knowledge both of the theory and practice of the law, we remember the names of William B. Sewall of this state, James Savage, Esq., of Boston, and General Eustis, now of the army.

In 1806, Mr Parker was raised to the bench of the supreme court of Massachusetts, at the age of thirtyeight, and the next year he removed to Boston. In 1814 he succeeded to the office of chief justice on the death of the lamented Sewall, which took place at Wiscasset in that year. It is unnecessary to dwell upon the character and virtues of a man so well known in our community as Isaac Parker : his fame is recorded every where ; " every day we turn the leaf to read it." We cannot omit, however, one remark of his, which showed much sagacity, and which we often remember : it was, that whenever he was at a loss in his practice in regard to the application of any point of law to the case on which he was consulted, to refer it always to the tribunal of common sense : for her decrees he seldom knew to fail of justice.

Of the fiftythree lawyers who had established themselves in Maine previous to the close of the last century, ten are now living. One of these, Chief Justice Mellen, has returned to the bar ; three are now upon the bench, viz. Judge Wilde, of Massachusetts, Ezekial Whitman, and Nicholas Emery, in Maine. All the others continue in practice, although, as may be supposed, not with that vigor which attended their earlier efforts. They were admitted to the bar in the latter years of the century.[1]

[1] Their names are Peter O. Alden, Edward Little, Benjamin Veasey, Jeremiah Bailey, Job Nelson, and Allen Gilman.

Of the fiftythree to whom I have alluded, seventeen became judges, three of them chief justices of the supreme court of Massachusetts, one chief justice of Maine, and one chief justice of Vermont: ten were members of Congress.

The following table will show the number of members of the bar in Maine at different times, and the proportion they bore to the population of the state.

Year.	Lawyers.	Population.	Proportion.
1760	4	19,000	1 to 4,750 Inhabitants.
1784	6	56,000	" 9,334 "
1800	40	152,000	" 3,800 "
1837	406	473,000	" 1,165 "

The oldest lawyer now in practice in Maine is Prentiss Mellen, late chief justice of the supreme court, who, disqualified by the provision of the constitution from retaining his seat upon the bench, has returned with youthful ardor to the bar, and now at the ripe age of 76, is contending manfully upon the field of his former fame. Mr Mellen was graduated at Harvard College in 1784 at the age of 20; pursued his studies in the office of Shearjashub Bourne, at Barnstable, and was admitted to the bar in Plymouth county in 1788. On this happy event, the judge humorously remarks, "according to the fashion of that day, on the great occasion, I treated the judges and all the lawyers with about half a pail of *punch*, which *treating aforesaid*, was commonly called the colt's tail." This feudal custom, like every thing else in this day of the march of mind, has been commuted into money to make provision for the intellect instead of the body.

In 1792 he removed to Biddeford, in this state, at the recommendation of his steadfast friend, Judge Thacher. To show the humbleness of the beginnings in that period, we may add, that he opened his office in the front chamber of a tavern, in which were arranged *three* beds, half a table, and one chair, according to his own account of the scene. He slept in the same room, as frequently did travellers; and his clients, as there was but one chair in the room, had the privilege of sitting on one of the beds.

From this humble commencement of life, Judge Mellen advanced rapidly. He was indefatigable and ardent in business, able and successful both as an advocate and a lawyer. From 1804 until his appointment as chief justice in 1820, he practised in the courts of every county in the state, and was engaged in all causes of magnitude. He often came in competition with Judge Wilde, who then resided at Hallowell, and had an extensive practice in Maine. The intellectual struggle between them, furnished ample opportunity for instruction and pleasure to their brethren of the bar.

Although Judge Mellen has devoted more than half a century of his life to the profession with signal ability, he has occasionally been diverted from it, like lawyers generally in our country, by the excitements of politics. He was a member of the council of Massachu-

setts, in the administration of Gov. Brooks, and was subsequently elected to the senate of the United States. While in the discharge of the duties of the latter office, on the separation of Maine from Massachusetts, he received the appointment of chief justice of the supreme court of the new state. The first eleven volumes of the Maine reports, embracing the period of fourteen years in which he presided in that court, bear witness of the learning, industry, and judicial wisdom with which he discharged the duties of that high station.

The customs of the bar have undergone within the last fifty years as thorough a revolution as the civil institutions of our country. The gradual wearing away of the distinctions which formerly existed in society; the levelling hand of modern refinement and universal cultivation, has pruned off all the excentricities, and wit, and peculiar traits of character which used to make the frequent meetings of the bar so jovial, and so productive of anecdote and pleasure. The last relic of social intercouse, the dinner on occasion of the assembling of the supreme court, has given way within a few years, and the common bond of brotherhood which kept alive a strong feeling of interest and *esprit du corps*, has now become a feeble and attenuated thread. The sentiment of union and fraternity has become weakened by its great diffusion.

When the judges, attended by their retinues of attorneys, travelled the circuit, extending through the scattered settlements of this state, they were driven by the tediousness of the journeyings, and the absence of other society and sources of amusement, to beguile the time not employed in the performance of their duties, in social meetings. The labor of a lawyer was easy at that period, compared with that of the present day: there were few books of authority to be examined and cited; there were no volumes of reports scattered as now, like the leaves of the sibyl upon his path, and the standard of legal acquirement was moderate. A good voice, a fluent utterance, and a discussion of general principles answered every demand, instead of the heavy, ponderous arguments of the present time, larded all over with authorities from all quarters of this and foreign lands, and often an endless variety of legal points and distinctions without differences.

In looking back to the past, we imagine we see approaching at a moderate pace upon his raw boned horse, the tall form of the eccentric Judge Paine, or the dignified figure of Judge Cushing, plodding through Saco woods, or the more lonely paths of a more remote portion of the territory, accompanied by the benevolent Sewall, the witty Thacher, and the gay and humorous Davis, beguiling the dreariness of their ride, which they pursued on horseback, by the buoyancy of spirits with which the younger members of the party were overflowing.

On going still farther back, to the times of the Livermores, the Farnams, the Lowells, and the Adamses, we refresh ourselves with reminiscences of the wit and merriment of those festive occasions, in which after the work of the court was over,—the wig, the robe, and

all dignity laid aside—they indulged themselves in the unreserved play of their minds.

With one of these scenes, preserved by Judge Sewall, we will close our article. "It was the custom for members of the court and bar at the close of the session to hold special courts at the tavern, which were made the occasion of festivity and wit. At one of those seasons when the superior court was held at Biddeford, Hill, Sparhawk, Jordan and Moulton being on the bench, the court sat at the public house of one Ladd, there being no court house in that town. The late Judge Lowell of Newbury Port, arrived on Monday evening to attend the court, and called upon landlord Ladd to accommodate him during the session. Ladd told him that his house was full and he could not accommodate him. Mr Lowell was obliged to seek lodgings elsewhere, but supposing Mr Ladd would take care of his horse, if he could not receive him, left him tied at the post in front of the house. It so happened, that the horse was overlooked, and remained where Mr Lowell left him, all night. On Friday evening, a special court was held at Ladd's, for the hearing and determining of small causes of omission and commission that had occurred during the week. Daniel Farnam, Esq. was appointed judge. Among other causes, landlord Ladd was called upon to answer his neglect in not taking care of Mr Lowell's horse, and for suffering him to stand all night at the door of his tavern. The fact was not denied, but in excuse he said that he had told Mr Lowell he could not give him entertainment, as his house was full before he applied, and that he did not recollect that when Mr Lowell went away, any thing was said about his horse. Upon this evidence the judge ordered the landlord to pay a single bowl of good punch for his neglect in not taking proper care of the horse, and that Mr Lowell should pay twice as much for suffering the poor animal to remain all night at the door. The sentence was carried into immediate execution for the benefit of the company convened." W.

Portland, Me.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, May Term, 1840, *at Boston.*

MAGOUN v. NEW-ENGLAND MARINE INSURANCE COMPANY.

The maxim, *causa proxima non remota spectatur*, is not of universal application in the law of insurance; and does not exclude incidental losses, flowing as a legal or natural consequence from the direct injury or loss to the thing insured. Thus, if there be a capture, and before the vessel is delivered from that peril she is afterwards lost by fire or accident or negligence of the captors, the whole loss is properly attributable to the capture.

The sentence of a foreign court acting *in rem*, in cases of revenue seizure and cases of prize, is, in general, entirely conclusive. And it seems, that such sentence is never re-examinable as to its validity, upon the mere ground that there had been false swearing in the case by the agent of some of the parties in interest.

A vessel was seized in a foreign port by the custom-house officers, for an alleged violation of the revenue laws, and upon trial the sentence of the court affirmed, that there was no justifiable ground for the seizure, and the vessel was ordered to be restored; but from her long exposure, in consequence of these proceedings, it was found, that she could not perform the voyage home without great repairs, which would cost more than her value. She was accordingly abandoned, and in an action against the underwriters, it was held, that they were liable for a total loss.

THIS was the case of a policy of insurance underwritten by the defendants on the 20th of March, 1838, whereby they insured for the plaintiff, for whom it concerned payment to him, four thousand dollars on the schooner Yankee, and on her freight, at and from St. Thomas to Rio de la Hache, and at and from thence to New York, viz: $3200 on the schooner, and $800 on freight; against the usual risks in the Boston policies. The declaration alleged a total loss by the arrest and detainment of the authorities of the Republic of New Grenada, and also a total loss by the perils of the seas. The parties agreed to a statement of facts; and the cause was accordingly argued upon that statement and the written evidence and documents referred to in the case, by

Francis C. Loring for the plaintiff, and by

Samuel Hubbard for the defendant.

STORY J.—The substantial facts in this case are as follows: The schooner proceeded from St. Thomas to Rio de la Hache in ballast under a charter party, to take on board a cargo of hides and logwood at the latter port to be carried to New York, for the freight of which $600 was to be paid. A cargo was accordingly taken on board at Rio de la Hache about the 7th of March, 1838, and the schooner being then ready for sea, the master applied for a clearance, which was refused, and he was arrested and imprisoned, and his vessel seized and forcibly taken possession of, by the local authorities. The asserted ground of the arrest of the master and the seizure of the vessel was, on account of a supposed illicit and prohibited trade. It appears, that about the time when the vessel was about to sail, six bags of beans were supposed to have been landed in a canoe from the schooner, without a permit, they being of the value of about $25. The beans were seized on shore by the custom-house officers; and afterwards on searching the schooner, they found certain bags of beans of her stores were missing; and thereupon they arrested the master and seized the schooner as forfeited, presuming that the missing beans were those illegally landed. Proceedings were duly had against the vessel in the proper tribunal of the district of Magdalena, and on the 23d of May, 1838, a sentence was pronounced, confiscating the beans seized and the canoe, condemning the master to pay $25, the value of the beans found missing from his vessel, and the costs of suit, but acquitting the vessel. Up to the time of this de-

cree, the master was held in imprisonment. From this sentence an appeal was taken to the superior tribunal of the republic, at Carthagena, where a sentence was pronounced on the 25th of July, 1838, by which the sentence of the court below, as to the acquittal of the vessel and condemnation of the beans, was affirmed ; but was reversed as to the canoe, on account of the value of the beans not being sufficient to justify the confiscation thereof. It then proceeded to declare, that the master was guilty of a fraud in allowing the landing of five bags of beans from the schooner without a permit ; but that the fraud not being to the value of fifty dollars, the vessel was not subject to any forfeiture therefor ; and it then directed, that the master should pay the value of the five bags of beans landed, viz : $25, and condemned the judge below to the payment of costs. The vessel was accordingly restored ; but when restored, it was found that from her long exposure to the weather in a hot climate, in an open roadstead, her hull and sails and rigging were so much injured, that she could not, without very great repairs, be enabled to perform the voyage ; that the repairs could not be made at Rio de la Hache ; or at any other port, to which the vessel could proceed ; that the repairs would cost more than the vessel was worth ; that the hides belonging to the cargo had become rotten and were thrown overboard, and that no other vessel could be found at the port to carry the residue of the cargo to New York. Under these circumstances, the master refused to receive back the vessel without indemnity, and abandoned her. On the 8th of October, the plaintiff, as soon as he received information of the facts, abandoned the vessel and freight to the underwriters, who refused to accept the abandonment.

It is under these circumstances of the case, that the present action is brought. And the first question which arises is, whether there has been a total loss in the sense of the law of insurance. It is clear, that there has been no loss by the perils of the seas. But there has been a restraint and detainment of the government within the words of the policy. Has there been a total loss by reason of the restraint and detainment ? I think there has been. The argument is, that the injuries to the vessel by the long delays and exposure to the climate were the immediate cause of the loss, and the seizure and detainment the remote cause only ; and that, therefore, the rule applies, ***causa proxima non remota spectatur ;*** and the underwriters are not liable for injuries by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me, that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. It would be an over-refinement of metaphysical subtlety to hold otherwise ; and would shake the confidence of the commercial world in the

supposed indemnity held out by policies against the common perils. The decision of the supreme court of the United States in *Peters v. Warren Insurance Co.* at the last term, (14 Peters R.) is directly in point; and in my judgment fully settles, that the restraint and detainment under the seizure, are to be treated as the proximate cause of the loss in the sense of the rule. The vessel was never delivered from that peril until she was virtually destroyed and incapable to perform the voyage. But if it were possible to get over this point, as I think it is not, the loss of the voyage arising from the total incapacity of the vessel to perform it, would, under the circumstances, it being by a peril insured against, be decisive upon this point.

In the next place, as to the sentence of the court of appeals. The policy contains a clause "that the assurers shall not be answerable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The true construction of this clause of the policy was finally settled by the supreme court of the United States in the case of *Carrington v. Merchants' Insurance Co.*, (8 Peters R. 495.) It was there held, that it was not necessary to bring the case within the clause that there should be a justifiable cause of condemnation; but only that there should be a justifiable cause of seizure, or, in other words a probable cause of seizure. If the seizure be tortious and without such cause, it is treated as not *bona fide* done, as an act of lawless violence, or of arbitrary power, or of gross fraud, or at all events, of unjustifiable force, according to circumstances. The question then arises, whether the seizure in this case was justifiable or founded upon probable cause. Now, the sentence of the appellate court expressly affirms, that there was no justifiable ground for the seizure of the schooner; that the very act of illegality in landing the six bags of beans, asserted in the libel proceedings *in rem*, supposing it to be true, furnished by law no ground for the seizure of the schooner, because the value was only $25; and no penalty could attach upon the vessel by law, unless the goods illegally landed from the vessel were of the value of fifty dollars. Now, this is an adjudication upon the very point in controversy, as to probable cause; and it negatives the existence of it.

Then, is this sentence conclusive, or are the parties at liberty to go behind it, and to prove *aliunde* the existence of a probable cause of the seizure? It appears to me, that, independently of fraud, (a point which will be presently considered,) the sentence is conclusive. This is the established doctrine of the supreme court of the United States, which was fully examined and considered by this court in the recent case of *Bradstreet v. Neptune Insurance Co.*, (2 Chandler's Law Reporter, 262), and, therefore, it need not be here farther discussed.

But, then, it is said, that here the sentence was founded in fraud. It is not pretended, that there was any fraud or participation in any fraud on the part of the court; and, certainly, if contended for,

there are in the case no proofs to support it. The only ground asserted for the imputed fraud is, that the master of the schooner swore falsely in relation to the matter in controversy before the court upon the trial of the seizure, and thereby procured the sentence of reversal of the appellate court; and that it is apparent from the other evidence now produced, that there was probable cause of the seizure.

Now, in the first place, I do not know, that it any where appears that the master was a witness, or what in fact he did swear to if a witness, at the time of trial and hearing of the cause; for it is not stated in the transcript of the proceedings; nor does it appear, what effect, if any, the evidence given by him had, or could have, upon the ultimate decree, pronounced by the court below, or by the appellate court. What the master said, if he was a witness, might have had no influence upon the decision, for aught that the record directly states or discloses. The most, that can be said, is, that the master concealed, that eleven bags of beans had been illegally landed from the schooner, instead of six; and that thereby both courts were misled in their decrees. But concealment of facts would be a new head of the law, upon which to avoid a sentence of condemnation or acquittal in case of a seizure and proceedings *in rem*. Nor do I know, (but I give no opinion on the point) that it has ever been judicially held, that a sentence of a foreign court, acting *in rem*, as in cases of revenue seizures or cases of prize, has ever been held to be re-examinable, as to its validity either in cases of condemnation or acquittal, upon the mere ground, that there had been false swearing in the case, by the agents of some of the parties interested. That would be a very broad ground, and open a wide door to impeach the validity and conclusiveness of such sentences. If such evidence be admissible at all, it is equally admissible to disprove and vacate a sentence of condemnation, as well as a sentence of acquittal. It seems to me, that if evidence of false swearing in such cases be admissible to disprove the sentence, and establish fraud in it, (on which I give no opinion) it ought to be clearly shown, that it was the real, substantial, and efficient cause of the sentence, and not that it might have formed an ingredient in it.

In the present case, it is far from being clear, that eleven bags of beans were illegally landed from the schooner. There is considerable confusion in the evidence on this point. But it is unnecessary to consider it, since it is plain upon the very face of the proceedings, that the only asserted ground of forfeiture was the illegal landing of six bags of beans. No other matter was, or could be brought into controversy in the suit. The seizure was for that act and for that alone. It is wholly immaterial, what other causes might have existed to justify a seizure. The only question is, what in fact was the positive cause of the seizure, not what might have been a good cause. From what has been already stated the professed cause of the seizure was an act, which, by law, could not induce any forfeiture, and conse-

quently, could furnish no justifiable or probable cause for the seizure. By our law (Act of 1799, ch. 128, s. 50) the landing of goods of the value of four hundred dollars from a vessel, without a permit, will subject the vessel to forfeiture. But, if a vessel were seized for landing goods of the acknowledged value of not more than fifty dollars, it would be impossible for the court to hold, that there was any justifiable or probable cause for the seizure of the vessel.

In truth, therefore, whether there was false swearing or not, or any fraudulent concealment or not, by the master, it is clear, that the appellate court proceeded in its sentence upon the fact, that the illegal landing of six bags of beans was the sole cause of the seizure; and that, consequently, it was without any justifiable or probable cause in law or in fact.

This view of the matter disposes of the whole merits of the defence; and it is unnecessary to discuss the other points, incidentally suggested at the argument. Upon the whole my opinion is, that the loss is clearly a total loss within the policy; and that the case does not fall within the clause exempting the underwriters from losses and charges and damages occasioned by seizure or detention, on account of illicit or prohibited trade.

Supreme Judicial Court, Massachusetts, March Term, held by adjournment June 15, 1840, at Boston.

LOBDELL v. BAKER.

Where one affirms what he knows to be false, or does not know to be true, to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood.

A person fraudulently procured the indorsement of a minor upon a note and then authorized a broker to sell it. Held, that this was equivalent to an express affirmation, that the note was a valid contract on which the makers and indorsers were liable; and that the party could not exculpate himself by proving that he repented of his intended fraud, as he did not erase the name of the minor.

Held, also, that he was responsible for the representation of the broker that the indorsement was valid, although made without his authority and contrary to his express instructions.

Where a special agent exceeds his authority, the principal is not bound by his misrepresentations unless he has held him out as his general agent. But the authority of a general agent cannot be limited by any private instructions, unless they were known to the person dealing with him; and this rule extends to factors and brokers.

TRESPASS on the case. The declaration alleged, that the defendant, on the 25th of February 1837, was possessed of a promissory note dated the 3d of said February, for $2775 89, payable in five months, signed by Hicks, Lawrence & Co., of New York, payable to James J. A. Bruce, of New York, or order, and by said Bruce indorsed in

blank. That the defendant being desirous to sell the same, with the design to deceive, defraud and injure all such persons as might thereafter, in any manner, become purchasers of the note, and to cause them to purchase the same with the belief and understanding, that it was indorsed in addition to the indorsement of Bruce, by one other person, whose indorsement was valid, effectual, and not capable of being avoided, procured said note to be indorsed in blank by one Joseph Swan, Jr., a minor, in his employment, and known by him to be such minor. That having procured such indorsement of said minor, the defendant, by his agent, Benjamin Winslow, a broker, offered to sell it to one Stearns, and that Stearns, relying on the indorsement of Swan as effectual and not capable of being avoided, purchased the note of the defendant, and paid him therefor the sum of $2700. That on the 11th of March following, before the note became due, the plaintiff relying on the indorsement of Swan as effectual, and not capable of being avoided, and in consideration thereof purchased the note of Stearns, and paid him therefor $2700.

That when the note became due, the promissors failed to pay, and the indorsers, Bruce and Swan, were duly notified and refused to pay. That the plaintiff commenced suit against Swan on the note, who pleaded his minority, and on that ground recovered a verdict and judgment against the plaintiff for costs, by all which the plaintiff had lost the sum paid by him for the note, &c., and his counsel fees and costs in this suit against Swan. The general issue was pleaded and joined.

At the trial before WILDE J., at the last November term, the plaintiff, to maintain the issue on his part, after proving a demand on the promissors, notice to the indorsers and his judgment against Swan, called Swan as a witness, who testified that he indorsed the note together with two others, drawn and indorsed by the same parties, amounting in all to about $7000; that he did so at the request of Baker, who called him to the desk, asked him if he was afraid to do so; to which he replied that he was not, and thereupon put his name on them; that nothing more was said. That he was then eighteen years of age, and had been a year or two in the defendant's employment. That he had an uncle in New York, Caleb Swan, of the firm of Stone, Swan & Mason, an old established house, which was dissolved about that time.

Evidence was introduced on the part of the plaintiff tending to show that Stearns, who purchased the notes of Winslow, and afterwards sold one of them through Winslow to the plaintiff, relied at the time he purchased, on the promissors, and also on Swan, the indorser, supposing him to be of the firm of Stone, Swan & Mason; all which was denied by the defendant, who introduced evidence tending to impeach the witness.

Testimony was introduced on the part of the defendant, tending to show that to an inquiry of Winslow, made before the sale by him, as to who Joseph Swan, Jr., was, the defendant replied, "that name is nothing, the notes are good enough without." He also proposed to

inquire of a witness as to the defendant's declarations immediately after Swan went away, and not in his hearing. The plaintiff objected, and the court admitted the evidence reserving the question. Witness then stated, that two or three minutes afterwards, the defendant said, "he was sorry he had got Joseph to indorse the notes, but it would do no harm." The notes were then put away.

The defendant called Paul Alden, his partner, and proposed to inquire of him, as to a conversation between witness and Winslow, when Baker was not present. The plaintiff objected, and the court admitted the evidence, reserving the question. The witness then testified, that Winslow came to the store, and had some conversation with him; said that there was a name on the notes not on his memorandum; asked if he was a responsible person; witness replied that it did not make the note any better, it was good enough without it. The plaintiff afterwards called Winslow, who contradicted the statement.

There was conflicting testimony as to the credit and standing of Hicks, Lawrence, & Co., at the time of the sale to the plaintiff.

The plaintiff proposed to give in evidence the declarations of Winslow, as to the character of the notes, and the parties to the same at the time of the sale thereof to Stearns and the plaintiff, but the defendant objected, and the court sustained the objection.

The court instructed the jury, that if the defendant authorised Winslow to sell the notes on the credit of the names of Hicks, Lawrence & Co., and Bruce only, the defendant was not chargeable, although Winslow did sell, and the plaintiff did buy them on the credit of these, and Swan's name also.

The plaintiff insisted that the procuring the indorsement of Swan, and putting the note into the hands of a broker for negotiation, rendered the defendant liable to any third person who might take the note, ignorant of the fact of Swan's minority, and placing any reliance thereon, although the defendant when he put the note into the broker's hands, said to him that Swan's name was of no value. But the court instructed the jury, for the purposes of the trial, and to ascertain a material point in the defence, that if they should be of opinion from the evidence, that Swan's indorsement was procured with a fraudulent intent, that would not be such a fraud as would make the defendant liable in this action, if on the whole evidence they should find that the defendant had no fraudulent intention, when he put the note in circulation.

After the jury had been out for some time they came into court with a written request for instructions in the following words:

"Would the plaintiff be entitled to a verdict, if the fraudulent act was proved to the satisfaction of the jury, provided there was a doubt in the mind of the jury, whether or not Lobdell was apprised that the name of Swan, jr., was not valuable." Upon which the court instructed the jury that the burden of proof was on the plaintiff to prove that he was deceived by the fraudulent conduct of the defendant, and that he gave some credit to the name of Swan, and that if they doubted on that point, their verdict should be for the defendant.

Upon these facts the case was submitted to the jury, who returned a verdict in favor of the defendant, whereupon the plaintiff's counsel excepted to the rulings of the court in the admission and rejecting of the evidence objected to, and to the instructions to the jury.

Bartlett for the plaintiff.

Choate for the defendant.

WILDE J.—It was argued for the plaintiff on the evidence, that the defendant procured the indorsement of Swan for the fraudulent purpose of giving a false credit to the note, and thereby to deceive and injure all such persons as might afterwards purchase the said note, believing the said indorsement to be valid and not voidable.

The defendant's counsel insisted, that there was no sufficient evidence of any frandulent intent of the defendant in procuring Swan's indorsement. That it was inadvertently done, and the intention of selling the note with Swan's indorsement was immediately abandoned, and when he put the note into the broker's hands, he was informed that Swan's name was of no value. It was also contended, that if the jury should find that Swan's indorsement was procured fraudulently, as charged in the declaration, yet the defendant was not liable unless the note was sold and put in circulation with a fraudulent intent; and on this point of defence the defendant's counsel principally relied. In order, therefore, to ascertain whether the note was sold and put in circulation with a fraudulent intent, the jury were instructed that if Swan's indorsement was procured with a fraudulent intent, it would not be such a fraud as would render the defendant liable in this action, if on the whole evidence they should find, that the defendant had no fraudulent intention when he put the note in circulation.

If this instruction be incorrect, the plaintiff is entitled to a new trial; for although the jury may have found for the defendant on another ground of defence, namely, that no credit was given to Swan's indorsement, yet this is uncertain; some of the jurors might have agreed to the verdict on one ground, and some on another; so that the verdict must be set aside if there was any material misdirection in the defendant's favor as to either of the grounds in defence.

The principal question is, whether it was necessary to be shown that the note sued was put in circulation with a fraudulent intent. The argument for the defendant is, that fraud is the gist of the action, not carelessness or negligence. That the fraudulent intention, if any there was, with which the indorsement of Swan was procured, was immaterial, unless it continued up to the time when the note was sold, and that the only material question is, whether the sale was fraudulent.

On looking into the abstract of the declaration, we find that it is not averred that the defendant sold the note with any fraudulent intention. It alleges, that the indorsement of Swan was procured by the defendant with such an intention; and that he offered to sell it to Stearns, who, relying on the indorsement of Swan as effectual, purchased the

note of the defendant, and paid him therefor $2700. If, therefore, the argument of the defendant's counsel be well founded, and it is necessary to prove that the sale was made with a fraudulent intent, the defendant might prevail on a motion in arrest of judgment. But if a new trial should be granted, this defect, if it be one, might be supplied by an amendment. This question, therefore, is to be decided without any regard, in this particular, as to the form of the declaration.

Several cases were cited on this point which we think decisive.

In *Adamson v. Jarvis*, (12 Moore 251) it was averred in the declaration, that the defendant having property of great value in his possession, represented to the plaintiff that he had authority to dispose of it, and the plaintiff thereupon purchased it; but it was not averred that the defendant knew he had no authority to make the sale; and after a verdict for the plaintiff, it was held, that a *scienter* was not necessary, and the case was distinguished from that class of cases, where a party having no interest in a matter about which his opinion is applied for, gives an honest though mistaken one, he is not responsible. There is no question as to the *scienter* in the present case; but the decision in the case cited, shows that a party may render himself liable in an action for damages to a party prejudiced by false affirmation, though not made with any fraudulent intention.

Several other cases were cited, by the plaintiff's counsel, to establish a very familiar principle of law, in respect to which there can be no controversy.

The principle is, that where a party affirms either that which he knows to be false, or does not know to be true to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood. This is a very just and reasonable principle, and is well established; the only doubt, if there be any, is, whether it is applicable to the question now to be decided. There was no evidence that the defendant made any express declaration that the note sold was a valid note, and that the makers and indorsers were liable; but we are all of opinion, that if he fraudulently procured the indorsement of Swan, and then authorised Mr Winslow to sell the note without erasing the name of Swan, knowing as he did that Swan was a minor, and not by law liable on the note, all this would be equivalent to an express affirmation that the note was a valid contract, on which the makers of the note and the indorsers were by law liable. A party is to be presumed to have intended the consequences of his own acts. And if the defendant had repented the procuring of Swan's indorsement, to render his repentance effectual, he should have erased the indorsement before he put the note in circulation, so that no one might be deceived and defrauded thereby.

For these reasons, we are of opinion that the plaintiff is entitled to a new trial. The same reasons have a bearing also on another question which may be of importance on a new trial.

The plaintiff offered to give evidence of the declarations and representations of Mr Winslow, made by the defendant to Stearns and

the plaintiff, at the time of the sale of the note, as to the parties to the same. This evidence, we think, is relevant to the issue, and ought to have been admitted. It was rejected on the ground, that the defendant was not responsible for any misrepresentations made by his agent without authority, and contrary to the defendant's express instructions. This is undoubtedly the law as to all particular and special agents, for it is the duty of the person dealing with such an agent to ascertain the extent of his authority, and if the agent exceeds the limited authority conferred on him, the principal is not bound by his misrepresentations, or any other unauthorised acts, unless the acts so done are within the scope of his authority, in the performance of the act he was authorised by the principal to perform, or unless the principal had held him out as his general agent, or as one having a more enlarged authority. (Story's Ag. 132). But this rule of law is not applicable to the present case; for the authority of a general agent cannot be limited by any private instructions, unless they were known to the person dealing with him; and this rule extends to factors and brokers acting in the line of their employment. And it makes no difference, as Judge Story remarks, whether the factor or broker had been ordinarily employed by the principal, or it is the first instance when he was so employed. This distinction between general and special agents, is discussed by Judge Story with his usual fulness and ability, in his commentaries on the law of agency, and he approves the rule laid down by Smith, in his treatise on mercantile law, p. 59. (St. Ag. 116.) "A general agent," he says, "is a person whom a man puts in his place, to transact all his business of a particular kind; thus, a man usually retains a factor to buy and sell goods, and a broker to negotiate all contracts of a certain description; and so in other instances. The authority of such an agent to perform all things, usual in the line of business in which he is employed, cannot be limited by any private order or direction, not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, i. e. an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one, to ascertain the extent of his authority; and if he do not, he must abide the consequences."

This seems to be a reasonable rule which is founded on public policy, and is well supported by the authorities. In the case of *Pickering v. Breck*, (15 E. 42) Lord Ellenborough says, "that he could not subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases, limited to his actual authority; for it is clear that he may bind his principal within the limits of the authority within which he has been apparently clothed by the principal, in respect to the subject matter; and that there would be no safety in mercantile transactions if he could not." So Bayley J. remarks; "that if the servant of a horse dealer, with express directions not to warrant, do warrant, the master is bound, because the servant, having a general author-

ity to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed."

This doctrine is conformable to the well established principle, that when one or two innocent persons must suffer by the fraud or negligence of a third, he is to bear the loss who enabled the third person to do the injury, by giving him credit, and holding him out to the world as his agent. *A fortiori*, if an innocent person sustains a loss, occasioned by the fraud or misconduct of another person, the latter will be held responsible, although he can show that the loss would not have been incurred, but for the misconduct of a third person ; especially if that person is his agent.

There is also another satisfactory reason for admitting evidence of the representations made by Mr Winslow, at the time of the sale of the note, because the evidence might have an important bearing on the question, whether the plaintiff or Mr Stearns purchased the note with any reliance on, or giving credit to, the indorsement of Swan. A question upon which, as it seems, the jury entertained some doubts.

As to the admission of the evidence in favor of the defendant, to which the plaintiff excepted, we are of opinion that the exception is not well founded. But the evidence will be of no importance on the new trial, in consequence of the decision of the court on the principal question raised by the exception to the instructions to the jury. For if the defendant fraudulently procured the indorsement of Swan, he cannot, in our judgment, exculpate himself, by proving that he repented of his intended fraud, for it was his duty to erase the name of Swan, so that no person could possibly be defrauded by his indorsement. This evidence undoubtedly affects favorably the defendant's character ; but has no effect on his legal liability, if the indorsement of Swan were procured by him with the fraudulent intention of putting the note in circulation, and giving to it a false credit. If Mr Winslow was directed not to sell the note on the credit of Swan's indorsement, still if he did represent it as a valid indorsement, the rule in this action applies *Respondeat Superior*.

This rule is founded on a just and salutary principle of public policy, however hard its operation may be on the defendant, if he did not intend to sell the note on the credit of Swan's indorsement ; and it was so sold by Mr Winslow, contrary to the defendant's directions.

New trial granted.

STAPLES AND OTHERS v. FRANKLIN BANK.

A cause of action arises on a post note on any part of the day when it is due and payable, after it has been dishonored.

Question in relation to costs where a creditor comes in by virtue of the Revised Statutes, ch. 90. sec. 83, to dispute the validity of a prior attachment.

ASSUMPSIT on a post note issued by the defendants, for $2,500, dated November 8, 1836, and payable in eight months. The writ

was dated July 11, 1837, and was served by an attachment of real estate at seven minutes before eleven o'clock, A. M., on the day of its date. The action was entered at the October term of the court of common pleas, 1837. The defendants appeared, and the action was brought to this court by demurrer at the November term of the same year, and was subsequently defaulted; but the same property having been attached in other suits, this action stood continued till the November term, 1839, when James Barker, who had attached the same property subsequently to the plaintiff, filed a petition in which he prayed that the attachment of the plaintiff might be dissolved, on the ground that the sum of money by them demanded was not payable when their action was commenced.

It appeared at the trial, that Thomas A. Dexter, a notary public, on July 11, 1837, at the request of the plaintiff, went with the original promissory note to the banking house of the defendants, and then and there, within the regular banking hours, presented the same to the cashier, who replied that "the same will not be paid at present."

It also appeared that this demand was made before the commencement of the action; that the Franklin bank stopped payment prior to July 11, 1837, and that the bills of the bank ceased to pass as money, or as the bills of other banks after July 8.

The question whether or not the sum of money, demanded by the petitioner in his action against the Franklin bank, was payable to him at the time of the commencement of his action was submitted to the jury, and they returned a verdict in his favor.

The question was reserved for the whole court, whether the plaintiff's action was prematurely brought; and if they should be of that opinion, his attachment, so far as affected by the petition, was to be dissolved. Otherwise the petition was to be dismissed.

Washburn for the plaintiff.

Fletcher and *English* for the petitioner.

SHAW C. J.—The question in this case is substantially this; whether an action on a post note, payable on a particular day, can be brought before the close of banking hours on that day? We think that banks in this respect stand on precisely the same footing as individuals; and that a note of this kind is payable at any time on the day it is due. As soon as a note is dishonored, a right of action arises. The only difference between banks and individuals is, that they have the privilege of transacting their business at particular places; and by a sort of comity demands and notices must be made within banking hours. At the trial certain evidence was introduced as to usage, but it does not affect the view of the case which the court take, and the petition must be dismissed.

NOTE.—At a subsequent day after this decision, a question arose as to the costs, which accrued after the defendants were defaulted. The counsel for the plaintiffs suggested, that as the defendants were

defaulted and the judgment was delayed by the petitioning creditor, he and not the defendants ought to pay the additional costs which had accrued by means of his act. On the other side, it was said, that the defendants having had the use of the property during the whole time this matter was pending, ought to pay the costs ; but if after levying their execution, the plaintiffs find that there is not enough property attached to pay the debt and costs in full, they can then come upon the petitioner for the additional costs which have arisen in consequence of his interposition.

The court said, that the petitioning creditor ought to pay the *costs of court*, which had arisen since the defendants were defaulted ; but they did not decide whether he was also liable primarily for the *additional interest* which had accrued. They were clearly of opinion, however, that the plaintiff could take judgment for his original debt and the interest against the defendants ; and it was so settled ;—the plaintiff taking judgment against the intervening creditor for the costs of court which had arisen since the default, and against the defendants for the debt and costs to the time of the default, and interest until the final decision.

WHITWELL AND OTHERS v. WILLARD.

Construction of section 25, chapter 96 of the Revised Statutes, respecting the appointment of auditors.

THIS was an action against the sheriff of Worcester county for neglect of his deputy, in whose hands a writ was placed, with directions to attach the furniture, &c., of a large public house. The alleged default of the deputy consisted in his not attaching a part of the articles, and in losing a part of those which were attached. When the case came on for trial at the last term, the defendant moved for the appointment of an auditor, in accordance with the provision of the Revised Statutes, ch. 96. sec. 25. This was resisted by the plaintiffs, on the grounds that the course proposed was expensive and unnecessary, and because the present case did not come within the purview of the statute. PUTNAM J. overruled the plaintiff's objections, and ordered the case to be referred to an auditor. At this term the defendant brought the matter before the court in order that it might be fully settled in the present stage of the action.

C. P. Curtis for the plaintiffs.

Gray for the defendant.

SHAW C. J., in delivering the opinion of a majority of the court, said they were all of opinion, that the case was a very proper one to be referred to an auditor ; and if both parties consented to such a reference, the auditor's report would undoubtedly be good evidence to go to the jury ; but a majority of the court were of opinion, that it was not a case which was intended to be included in the provision of the

Revised Statutes upon this subject. The language of the statute was, that "whenever a cause is at issue, and it shall appear that the trial will require an *investigation of accounts*, or an *examination of vouchers* by the jury, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and to state the accounts and to make report thereof to the court." Now the questions which would be submitted to the jury in this case, although relating to a great variety and number of articles, would not require vouchers or the investigation of accounts. It would seem, that the statute referred only to those cases where there existed the relation of debtor and creditor. It was undoubtedly true, that this provision might be called into exercise in cases of tort, as in such cases the investigation of accounts was often necessary, for collateral purposes. There was no doubt, that such a reference might be useful for certain purposes, in all cases; but unless the parties consented, it could only be done in those cases specifically referred to by the statute; and the majority of the court were of opinion that this was not one of those cases.

PUTNAM J. dissented. He said it was undoubtedly true, that cases proper to be referred to an auditor would most generally be those of assumpsit; but he was clearly of opinion, that the statute also included cases of tort. This was a remedial law, and should be construed liberally and not with a microscopic view. The present case in his opinion, clearly came within the purview of the statute. The action was in effect, to recover the value of a large number of articles in a great hotel. A great number of questions must arise, as whether there were twenty or forty dozens of champaigne; whether there were ten or fifty candlesticks, &c. Now if this was an action of assumpsit, there was no dispute that the claim would be referred to an auditor. But the facts involved were the same; the trial would be attended with the same questions and the same difficulties. The great question was, substantially, whether the plaintiffs should recover for the value of these numerous articles. For these reasons, he was compelled to dissent from his brethren.

COFFIN v. RAY.

Where land is conveyed to one who has notice of a prior unrecorded conveyance, and is attached as his property by his creditor, who has no notice of such prior conveyance, the latter is not affected by it, although he has notice of it before the levying of his execution. Nor will it affect his rights in this respect, that his attachment was not recorded in the clerk's office according to the provision in the Revised Statutes, chapter 90.

THE facts in this case were, that many years ago Isaiah Ray made a deed of certain land to the defendant, Peter Ray and his wife, to hold during their joint lives, which deed was not put upon record. Subsequently the grantor made an absolute deed of the same land to his son Isaiah C. Ray, in which no mention was made of the deed from Isaiah Ray to Peter Ray and wife. The plaintiff attached this land as the

property of Isaiah C. Ray, and sought to hold it by virtue of that attachment. He had no notice of the deed from Isaiah to Peter and wife before his attachment was made, but did have such notice before the levy of his execution on the land. It also appeared that his attachment was never recorded according to the Revised Statutes, ch. 90. secs. 28, 29, 30. At the trial, in Nantucket, the only question submitted to the jury was, whether the second grantee, Isaiah C. Ray, knew of the deed from his father to Peter and wife. The jury found that he did know of it.

Clifford for the plaintiff.

Coffin for the defendant.

SHAW C. J., in delivering the opinion of the court, said there was no doubt, that as Isaiah C. Ray knew of the deed from his father to Peter and wife, he could not take advantage of its not being recorded. Indeed, from the circumstances of the case, it was highly probable, that it was the intention of the parties that Isaiah C. was to take the *residue* of the estate, although he in fact received an absolute deed in fee. The question was, whether this knowledge of Isaiah C. could affect the rights of his creditor in this case, who had attached the land without knowledge of the first conveyance. The court were of opinion, that it could not. The exception in the statute in regard to the validity of unrecorded conveyances, where the second grantee knows of a former conveyance, was strictly personal ; and although the second grantee takes no estate, as he had notice of the former conveyance, yet if through him a title passes to a third person who had not such notice, the latter is not affected by it. Now, an attachment of real estate was in the nature of a purchase ; and the court were of opinion that the plaintiff, in this case, not having notice of the unrecorded deed from Isaiah to Peter Ray and wife, his claim to the land was perfect ; nor did it make any difference, that the plaintiff had notice before the levy of his execution. The point of time before which the notice would affect him, was that of the attachment and not the levy.

The defendant contended, that as the plaintiff did not have his attachment duly recorded according to the provision in the Revised Statutes, he had no lien upon the land by virtue of that attachment, and was affected by the notice, which he had before the levy, of the deed from Isaiah to Peter and wife. But the ruling at the trial upon this point was correct, that the attachment, although not recorded, was valid except as to subsequent purchasers or subsequent attachments. The defendant's claim rested upon a conveyance made long before the attachment. He could not be injuriously affected by the fact of the attachment not being recorded ; and he could not set up that fact in defence here.

Upon the whole, the court were of opinion that the plaintiff not having notice of the deed from Isaiah Ray to Peter and wife, before his attachment, must recover. This decision might operate hardly in the present case, but that could not alter the result.

Judgment on the verdict.

Wiggin v. Peters and others.

A debtor was committed on execution, April 1, 1839, and on the next day gave a bond for the prison limits. He surrendered himself to the keeper of the jail and took the poor debtor's oath on July 1, 1839. Held, that the surrender was within the time required.

Debt on a bond The plaintiff recovered judgment against Peters, one of the defendants, at the April term of the court of common pleas in Suffolk, 1838. On April 1, 1839, Peters was committed to the jail in Worcester on an execution regularly issued upon that judgment. On April 2, 1839, the bond, which was the subject of this suit, was given by the defendants for the prison limits, and Peters surrendered himself to the keeper of the jail on July 1, 1839; and having submitted to the preparatory examination, was discharged by taking the poor debtor's oath on the same day.

The question was submitted to the court, whether the surrender was made during the period required by the bond. If it was, the plaintiff was to be nonsuited. Otherwise the defendant was to be defaulted.

Barrett for the plaintiff.

Stowe for the defendant.

Shaw C. J., after stating the intent of the statute on this subject, said, that although the bond in this case did not adopt the precise language of the statute, yet in legal effect it conformed to it; and the court were of opinion, that the surrender of the debtor was within the time required.

Plaintiff nonsuit.

Hewett v. Wilcox.

An unlicensed physician may recover for services performed before the Revised Statutes were adopted, although before that time the claim was barred by the statute of 1818, ch. 113.

Assumpsit for medical services, rendered to the defendant to the amount of $150. The alleged services were performed before the Revised Statutes went into operation. The defendant insisted that the plaintiff could not maintain his action, because by the statute of 1818, chapter 113, it was provided, that no person entering the practice of physic and surgery, should be entitled to the benefit of the law for the recovery of any debt or fee accruing for his professional services, unless he had been licensed by the officers of the Massachusetts Medical Society, or had been graduated a doctor in medicine in Harvard University. No implied assumpsit could arise under this provision in favor of the plaintiff.

In answer to this, the plaintiff contended, that this law was repealed by the Revised Statutes, and that it made no difference as to his claim, that the services were rendered before the Revised Statutes were passed.

Wheelock for the plaintiff.

Bartlett for the defendant.

SHAW C. J.—It may be admitted, that the object of the statute of 1818 was to discourage unlicensed physicians, by refusing them the means of collecting their debts. But the statute went to the remedy, and not to the debt itself. It did not declare that no debt should accrue. When, therefore, this statute was repealed, the great principle of the common law, that every one is entitled to a fair compensation for services performed, was unobstructed in its application, and an implied assumpsit arose in favor of the plaintiff.

Judgment for the plaintiff.

NEW HAMPSHIRE SAVINGS BANK v. VARNUM.

Where an agreement was made between certain attaching creditors and the debtor, that the property attached should be sold in a manner different from that pointed out in the Revised Statutes ch. 90. sec. 57, and the proceeds were received by the deputy, who did not apply them to the satisfaction of all the executions; it was held, that the sheriff was liable for such nonfeasance of his deputy.

THIS was an action on the case against the sheriff of Middlesex for the non-feasance of his deputy, John Kimball, for not serving and returning a writ of execution against one Hastings. At the trial before WILDE J., it appeared, that the plaintiffs, with certain others, made sundry attachments of a stock of goods belonging to Hastings. Subsequently all the attaching creditors and Hastings made an agreement of the following tenor: "We, the creditors of Horatio W. Hastings, of Lowell, in the county of Middlesex, trader, do hereby consent that the personal property of the said Hastings, now under attachment by virtue of sundry writs in favor of us respectively, served by John Kimball, deputy sheriff, be sold by said Kimball, within one month from this date, *at public or private sale at his discretion*; and that the proceeds thereof be held to respond the judgment which may be rendered against said Hastings, according to Revised Statutes, ch. 90, sec. 57." It appeared that Kimball sold a part of the goods at public auction and a part at private sale. Three of the executions which came before the plaintiffs were satisfied in full, and Kimball caused the plaintiff's execution to be satisfied in part only, but had never returned the same, and the residue was unsatisfied.

A verdict was rendered in favor of the plaintiffs, and the defendant moved for a new trial, on the ground, principally, that the agreement made by the creditors and Kimball in relation to the rule of the property attached, in point of law discharged the defendant from all liability for the acts of the deputy, Kimball, in relation to the property.

H. H. Fuller and *F. Smith* for the plaintiffs.

Choate for the defendant.

PUTNAM J.—The defendant contends, that the agreement to sell these goods either by public or private sale, was contrary to the provision of the Revised Statutes, which requires property in such cases to be sold by auction; and, therefore, that Kimball acted in the matter as the agent of the parties, and is alone responsible for his own default or nonfeasance. That the defendant is liable for the neglect or misconduct of his deputies only for their official acts required by law, and, as the parties agreed to a mode of sale different from that prescribed by law, the defendant is not responsible. It must be conceded, that if Kimball did act as the agent of the plaintiffs, and any loss happened in the course of his agency, the defendant would not be liable; as for instance, if he had sold the goods upon a credit and the purchaser failed to pay. But that is not the posture of this case. If Kimball was the agent of the plaintiffs, he has conducted well so far as that agency was concerned. He sold the goods and has received the money. Now the money is in his hands *in the place of the goods.* It represents them. He has paid three of the attaching creditors, and has enough in his hands to satisfy the plaintiffs' claim. Indeed, he actually sold enough at auction to pay the plaintiffs' execution. This case is easily distinguished from one where the deputy acts as the agent of the attaching creditor. If a deputy should receive a bill of exchange to collect and apply to an execution, and should neglect to take the proper steps by which a loss happened, the sheriff clearly would not be liable. But where he actually receives the money, it stands in the place of the goods, and the sheriff is liable for his default in that respect.

Judgment on the verdict.

THOMSON, APPELLANT, v. MCGAW AND OTHERS.

Construction of will:—A widow is entitled to dower, although there is a provision in her favor in her husband's will, and although she does not make her election of dower within the six months required by the Revised Statutes, ch. 60, sec. 11, if it appear that the estate is insolvent, and the provision in the will wholly fails.

THIS was a question in relation to the appellant's right to dower in the estate of her late husband. The will of Erasmus Thomson contained the following clause: "I give to my beloved wife, Belinda Thomson, upon condition that she shall pay to each of my sisters, Lydia Burrell and Eliza Codman, the sum of $100, and afford to my mother, Lydia Thomson, a competent support during her natural life, all the real and personal estate of which I shall be the owner at the time of my decease, after my just debts shall have been paid. To hold and occupy the said estate so long as she shall remain my widow. In case of a second marriage on the part of my beloved wife, I give to her one third of my real estate, and to my children the remaining two thirds." The testator also appointed his wife the executor of his will, and authorised her to dispose at her discretion of any portion of his real estate, with one exception.

After the will was proved, an inventory returned, &c., the estate was represented insolvent, and the widow then claimed dower.

Aylwin and *Paine* for the appellant.

W. D. Sohier for the appellees.

DEWEY J.—The argument on the part of the appellees is, that the appellant's right of dower is barred by the provision in the will, she not having made her election of dower instead of the provision in the will, within six months, the time required by the Revised Statutes, ch. 60, sec. 11. For the purposes of the argument, we adopt the construction contended for by the appellees, that the omission on the part of the appellant to make her election within six months, operates as a waiver on her part of dower. But by the Revised Statutes, ch. 60, sec. 13, it is provided, that if a widow is lawfully evicted of lands, assigned to her as dower, or settled upon her as jointure, *or is deprived of the provision made for her by will or otherwise*, in lieu of dower, she may be endowed anew. Now, the appellant contends that upon the settlement of the estate, according to the provision in the will, there will be nothing remaining, and the entire provision in her behalf will fail. We think that the will contemplated that the estate was solvent, and there would be a *residuum* for the widow. If, therefore, the estate is insolvent, and after the legacies are paid there will be nothing left, the provision in favor of the widow wholly fails, and she is entitled to dower. But if the contrary shall appear, then she is not entitled to dower. This fact must accordingly be ascertained by evidence taken in some form to be hereafter pointed out.

BELCHER, PETITIONER FOR A CERTIORARI, v. JOHNSON.

The justices' court of the county of Suffolk has exclusive jurisdiction of informations filed for neglect of military duty.

THE petitioner set forth, that an information was filed against him by the defendant, as clerk of a military company, in Chelsea, before Francis B. Fay, a justice of the peace within and for the county of Suffolk, for neglect of military duty; and upon trial thereof, judgment was rendered against the petitioner for four dollars debt or damage, and the costs of the suit. The petitioner alleged that the proceedings were illegal in several respects, and that the said justice had no jurisdiction of the case, and concluded with a prayer that a writ of *certiorari* might issue to the said justice, that his records and proceedings might be certified to this court, so that the said judgment might be reversed, and the petitioner acquitted on the premises.

E. Smith for the petitioner.

Dana for the respondent.

DEWEY J.—By the Revised Statutes, ch. 87, sec. 11, it is provided, that the justices' court for the county of Suffolk "shall have and exer-

cise, exclusively, the same jurisdiction in all civil actions in the county of Suffolk, that is exercised by justices of the peace in other counties." The only question is, whether an information filed by the clerk of a company for a military fine is a civil or a criminal process. We are of the opinion that it is the former, and, consequently, the justice having no jurisdiction, the petition must be granted.

LORING, APPELLANT, v. STEINEMAN.

Under certain circumstances the court will presume a person to be dead, although there is no positive proof of the fact.

THIS was an appeal from a decree of the judge of probate, by the appellant, as administrator of John B. Steineman. It appeared that Steineman was a German, and was insane at and before the time of his death, and was under guardianship. He died without a will, and a question arose as to the distribution of his property. He came to this country from Oldenburg, and at his death he had a brother living there and three relatives, the children of a deceased brother. He once had another brother who has not been heard of for many years; and the question here was, whether the presumption was, that the other brother was dead and without issue.

Dehon for the appellant.

S. Hubbard and *Atwood* for the appellee.

SHAW C. J., in delivering the opinion of the court, said the case had been very properly brought before the court by the administrator, before distributing this property. The facts were, that the brother in question left Oldenburg more than thirtyfive years ago. He went to Hamburg and shipped as a sailor for Lisbon, and had never been heard of since. Now, it was necessary in order to distribute the estate, and in conformity with the law, for the judge of probate to point out the persons to whom the administrator was to pay over the proceeds of the estate in his hands. Questions of this sort often gave rise to much difficulty, and probably decisions in regard to the death of persons would sometimes turn out to be contrary to the facts. There might be cases in which persons were presumed by law to be dead who were not dead. What would be the effect of such decisions, when erroneous, it was impossible to say. For instance, if a married woman has good proof that her husband is dead, she may marry again, and if her husband turns out to be alive and returns, she undoubtedly would not be guilty of bigamy, because the guilty intent was wanting; but which husband would be entitled to her, would be a matter of doubt.

In this case, some decision must be made. The property must be distributed; and the court thought the conclusion of the judge of probate, that the third brother was dead and without issue, was the most proper and correct decision that could be made.

MILLER v. BAKER.

A party plaintiff, at the trial of his case, offered an instrument as a mortgage which was afterwards held not to be a mortgage, and a new trial was ordered.

Held, that the plaintiff was not estopped from offering the same instrument at the new trial, as an absolute bill of sale.

Trespass *de bonis asportatis* will lie for goods which are attached, although not removed by the attaching officer.

Held, that fruit trees which were cultivated for sale on land hired for the purpose, were personal property.

TRESPASS against the sheriff of Norfolk, for taking, by his deputy, and converting to his own use certain nursery trees, plants, and shrubs. At a hearing of this case, March term, 1838, the court decided that the instrument by which the plaintiff claimed to hold this property, was not a mortgage, and as it had been differently ruled at the trial, the verdict, which was for the plaintiff, was set aside, and a new trial granted. (20 Pick. R. 285; 1 Law Reporter 99.) At the second trial, at the last November term, the defendant contended that the plaintiff having at the former trial set up the instrument by which he claimed to hold the property in controversy, as a mortgage, was estopped from then offering it as an absolute bill of sale; also that for a part of the articles, this action would not lie, as they were not personal property. He further contended, that as these things had never been removed from the place where they were growing, an action of trespass *de bonis asportatis* could not be maintained for them. All these objections were overruled, and the jury returned a verdict for the plaintiff.

D. A. Simmons for the plaintiff.

S. D. Parker for the defendant.

DEWEY J.—We can see no force in the argument of the defendant's counsel that the plaintiff is estopped from setting up this instrument as an absolute bill of sale, because at the first trial he offered it as a mortgage. The counsel for the defendant, when this case was last before the court, contended that it was not a mortgage, and the court so decided and ordered a new trial. It would be singular indeed, if at a new trial, the plaintiff should be estopped from offering the instrument as an absolute bill of sale, merely because at the former trial he offered it as a mortgage. Nor was it necessary for the plaintiff in order to maintain his action, to prove that these articles were actually removed. If they were taken possession of, the present form of action is sufficient to recover for them.

Whether the fruit trees can be denominated personal property, and thus be included in the present action, is a question of more difficulty. But upon full consideration, the court are of opinion, that they are to be so considered, and that the plaintiff is entitled to the damages awarded by the jury, as well for the fruit trees as for the plants. The plaintiff had the same title as his vendor. The latter occupied the land as a nursery garden by leave of the tenant. The object of the

garden was to cultivate trees, shrubs, plants, &c., for sale. Whether such articles could be attached on process against the owner of the land is questionable, but need not be decided here. But the plaintiff had a right to remove these trees. They were articles of produce, reared to be sold. We think they must be considered as personal property. The authorities referred to by the counsel for the defendant, where a different doctrine appears to be held, do not apply to the present case. There is no doubt that when the land and trees are united in the same person they cannot be separated; but that is different from this case, where the trees were owned by one who hired the land for the express purpose of raising them for sale.

Judgment on the verdict.

Supreme Court of Pennsylvania, May Term, 1840.

COMMONWEALTH, EX RELATIONE HALL, v. THE CANAL COMMISSIONERS OF PENNSYLVANIA.

An assessment of damages by a majority of a board of appraisers constituted by statute to provide compensation for injuries to private property by public works, is a valid execution of their power.

IN obedience to a rule, the respondents showed for cause why a mandamus should not issue, commanding them to pay the relater 2,500 dollars, awarded as damages done to her real estate in Lycoming county by the construction of the West Branch division of the Pennsylvania Canal, that the sum had been assessed by only two of the three appraisers. By a statute enacted in 1830, the governor was directed to appoint three appraisers of damages, to whom, as a board, appeals might be made by proprietors dissatisfied with the compensation offered by the canal commissioners; and it was made the duty of these appraisers, being sworn, justly to assess the damages sustained, and to transmit a copy of the record of their adjudication, which was declared to be final, to the canal commissioners for execution. It was conceded, that when the assessment in this instance was made, there was a vacancy in the board by resignation.

Johnson, attorney general, insisted for the respondents, that although an assessment by two appraisers might be good, yet that to render it so, the three must have deliberated—a fact that cannot be presumed, as the board was incomplete at the time. And he founded his argument on the nature of the remedy which, being in derogation of the common law as well as trial by jury, ought to be strictly pursued. For this, he relied on the case of *Broad Street Road*, (7 Serg. & R. 444,) which he contended was an authority in point.

Watts, for the relater, conceding that a power to do an act of a private nature must be executed by all to whom it is given, contended

that the appraisers are a board for the transaction of public business; that they are sworn officers, whose duties are of a public nature; that they keep a record of their transactions; and that they are a *quasi* corporation: whence it results that an act of the majority is an act of the board. And for this, he relied on 3 T. R. 592, 6 T. R. 396, 2 Atk. 12, 9 Serg. & R. 94, 6 Serg. & R. 170, and 1 McCord 52.

Gibson C. J. delivered the opinion of the court. It is usually said that a power of a private nature—that is, a power to do a private act—must be executed by all to whom it is given, but that a power of a public nature, or to do a public act, may be executed by a majority. That there is a distinction is undoubted; but that the specific ground of it is to be found in the nature of the act, is not so clear. In *Withnell v. Gartham*, (6 T. R. 388) a power to appoint to a private charity which had been delegated by a testator to the vicar and churchwardens of the parish, was held to be well executed by a majority of the church-wardens, because they were a *qua* corporation; while, on the other hand, an order of affiliation was quashed in the *Queen v. West*, (6 Mod. 180) because it was founded on an affidavit made before only one of the justices, though the act of taking it was certainly of a public nature. If, then, the general rule is as it is usually stated, these two cases must be excepted from it. The criterion, however, seems to be not so much the character of the power, or of the act to be done by virtue of it, as the character of the agent appointed for the performance of it. Perhaps the result of the cases is, that an authority committed to several *as individuals*, is presumed to have been given to them for their personal qualification, and with a consequent view to an execution of it by them all; but, that where it is committed to them as a body, there is no presumption in the way of the usual method of corporate action by a majority. In the case of the *Baltimore Turnpike*, (5 Binney 481) viewers appointed by the quarter sessions to assess damages done to the soil by a turnpike company, were held to be such a body. That case is identical with the present, except that it is not near so strong, inasmuch as the official and *quasi* corporate character of the canal appraisers, keeping, as they must, a record of their proceedings, having succession, and been called a board in the act by which they are constituted, is more distinct than that of viewers of damages who become *functi officio* by performance of the single act for which they were appointed. So, in the *County Commissioners of Allegheny v. Lecky*, (6 Serg. & R. 170) a power to purchase a site for a jail was held to be well executed by a majority, having been given to the commissioners, not individually but collectively by their official title, and therefore carrying with it an apparent intent that it should be executed by them as a body. In the case before us, the appraisers could not have acted otherwise. The principle of execution by a majority, was doubtless borrowed from the practice of corporations, with whom, as with every associated body, it is a principle of necessity; for it would, in most cases, be impossible to obtain the assent of all the members of a numerous assembly: and

this perhaps is the consideration which lies at the bottom of the whole matter. In the *Commissioners v. Lecky*, it was said by the chief justice that the rule which requires execution by all, has never been applied to public business of a *judicial*, or of a *deliberative* nature; or to cases where powers have been given to corporate bodies—all which is incontestable. But all judicial and deliberative bodies partake strongly of the qualities of corporations. Every legislature is strictly a court; whence it is said by Sir Edward Coke, (1 Inst. 109 a) that the British parliament, consisting as it does of the King, lords, and commons, is the highest, most absolute, and most honorable court of justice in England; and I believe it is still customary in some of the eastern states to call the legislature the general court. County commissioners have always been at least *quasi* corporations; in which they differ from commissioners to take depositions, and from arbitrators who are always chosen for their presumed fitness for the business committed to them, and who, where the contrary is not specified in the terms of their appointment, must all join. It may be safely said, then, that any duty of an aggregate organ of the government, may be performed by a majority of its members, where the constituting power has not required a concurrence of the whole. Now these appraisers were constituted a board for the performance of duties of a public, deliberative, and judicial nature: they were, in short, a tribunal of appellate jurisdiction. Though not apparent on the face of the return, it is conceded that there was a vacancy by resignation in the membership at the time of the assessment. But that is a fact which, instead of weakening the relater's case, would strengthen it, and a possibility of its recurrence may make it a legitimate ground of the argument; for it cannot be supposed that the functions of the board would be suspended, to the public detriment, by the loss of one of its members. Private business might bear to be postponed till such a loss might be repaired, but public affairs are usually so urgent that they could not. Thus it was held in *Townsend v. Welson*, (3 Mad. R. 36; S. C., 1 Barnw. & Ald. 608) that the survivors of three trustees, to whom a power to sell, as well as to fill up vacancies in their number, had been given by deed, were rendered incompetent to act by the death of one of them; and that their competency could be restored only by a new appointment. But in *Doe, dem. Read v. Godwin*, (1 Dowl. & Ryl. 259) where parliament had vested the prizes of a city lottery in five trustees by name, with power to fill up vacancies by death before the drawing and conveyance of the prizes (city lots) to the fortunate ticket holders, it was held on ejectment, that the conveyance of a prize by four of the five (one having died) was effectual and good. In every aspect, then, it appears that two members of the board are competent to constitute a quorum; and that an appraisement by it, thus constituted, is valid.

As the parties desire no more than to have the opinion of the court on the point presented by the merits, we forbear to inquire into our power to issue a mandamus to public officers who represent the government; or to make any final disposition of the rule.

DIGEST OF AMERICAN CASES.

Selections from 20 Wendell's (N. Y.) Reports.

ALIEN.

A feme covert who is an alien may be naturalized; but her naturalization has not, under the general act of congress, a retroactive operation, so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization.—*Priest v. Cummings*, 338.

ASSUMPSIT.

Where a contract is made upon an assumed state of facts in reference to which there is a mutual mistake, money paid under such contract may be recovered back, *pro tanto*, in an action of assumpsit; and it was accordingly held in this case, where a contract was made for the sale and delivery of oats, and the parties, upon a mistaken state of facts, estimated the quantity at a certain number of bushels, for which the stipulated price was paid, that the purchaser was entitled to recover back the money paid for the difference between the estimated and real quantity; and that, notwithstanding he had agreed to take the oats at the estimated quantity, hit or miss.—*Wheadon v. Olds*, 174.

BILLS AND NOTES.

1. A bill of exchange drawn in one state of the union upon persons residing in another, is to be treated as a foreign bill, and a protest, apparently under the seal of a notary public, made in the state where the drawees reside, need only be produced, and proves itself as to the presentment and refusal; and so also, it seems, as to the transmission of notice to the parties on the bill, if such fact be stated in the protest.—*Halliday v. Mc Dougall*, 81.

2. Checks are governed in several particulars by the same rules that prevail in relation to inland bills of exchange, payable either on demand or at a given number of days after sight.—*Smith v. Janes*, 192.

3. Where the parties all reside in the same place, the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, it should be forwarded by the mail on the same or next succeeding day for presentment. —*Ib.*

4. Where a second indorsee of a check on receiving it put it into circulation, and not more than four or five days elapsed thereafter before it was sent for presentment, it was held, in an action by him against the payee, that he was not chargeable with laches; there being no evidence in the case but that he became the holder on the day it was negotiated by the payee. —*Ib.*

CHANCERY.

1. A decree of foreclosure of the equity of redemption, and a sale in pursuance thereof on a bill filed against the mortgagor alone, do not affect the rights of purchasers deriving title to the premises from and under the mortgagor, and who were not made parties to the bill in equity.—*Watson v. Spence*, 260.

2. A purchaser, under a void decree in possession of land, is viewed as a stranger, and cannot protect himself against the owner of the equity of redemption, by setting up an outstanding title in the mortgagee, at whose suit the decree was obtained.—*Ib.*

CONSIDERATION.

1. The release of a lien obtained by the suing out of an attachment, is a good consideration for the promise

of a third person to pay the debt of the party proceeded against by such process.—*Smith v. Weed*, 184.

2. An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt: but to render the promise obligatory, it must be in writing.—*Watson v. Randall*, 201.

CONSTITUTIONAL LAW.

A private act of the legislature authorizing the sale of the estate of infants, for their maintenance and education, is within the scope of the legitimate authority of a state legislature.—*Cochran v. Van Surlay*, 365.

CONTRACT.

1. On a note payable in ready made clothing, the payee has no right to demand a garment which has been made for a customer at a stipulated price.—*Vance v. Bloomer*, 196.

2. The holder of a note of this kind, it seems, may demand payment of it in parcels, and is not bound to take clothing to its full amount at one time.—*Ib.*

3. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance. —*Salter v. Burt*, 205.

CORPORATION.

An action of assumpsit lies against a monied corporation, for refusing to permit a transfer of its stock upon the books of the corporation, when by the act of incorporation such transfer is necessary to give validity to the transaction; case would lie, but assumpsit may be maintained. — *Kortright v. Buffalo Com. Bank*, 91.

COSTS.

In an action on a bond, other than for the payment of money, where the plaintiff assigns several breaches, the defendant is not entitled to costs, although the plaintiff fail in establishing several of the breaches assigned by him, if the plaintiff succeed upon any one breach; the defendant is not entitled to costs unless the plaintiff fail upon all the breaches.— *Fairbanks v. Camp and others*, 600.

DAMAGES.

In an action on the case for negligence in driving a carriage, whereby the son of the plaintiff was run over and killed: it was held, that the loss of the service of the child, and expense occasioned by the sickness of of the plaintiff's wife, caused by the shock to her maternal feelings, were proper items of damage: the same being laid as special damage in the declaration.—*Ford v. Monroe*, 210.

DEED.

Where in a conveyance of premises situate on the bank of a river not navigable, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street, the grantee takes *ad filum aquæ*. Mr Justice Bronson dissented.—*Starr v. Child*, 149.

EVIDENCE.

1. A person employed as an agent in the conducting of a particular business, at a fixed salary, who by the terms of the agreement with his employers, was to receive in addition thereto one third of the profits of the concern, but not to be liable for any losses, was held not to be a partner, and therefore a competent witness in an action brought by his employers.—*Vanderburg v. Hull*, 70.

2. The account books of a manufacturer, properly authenticated, are admissible in evidence, in an action by him against his customer, although

entries were originally made by a foreman in the factory, if such entries were made only for a temporary purpose on a slate, and were from time to time transcribed by the principal into his day-book.—*Sickles v. Mather*, 72.

3. Where a party who had transferred a note and guaranteed its payment, obtained another person to assume his place as guarantor, and was thereupon released by the holder of the note, it was held, on objection made, that by the release he became a competent witness in an action for the recovery of the note; that the objection went to his credibility, and not to his competency.—*Mott v. Small*, 212.

FRAUDS.

Where goods, amounting in the aggregate to upwards of $100, are purchased at auction, in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes but one contract, and the delivery of some of the parcels is sufficent to take the case, as to the residue, out of the operation of the statute of frauds.—*Mills v. Hunt*, 431.

HIGHWAY.

The public has not the right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such user has been continued for more than twenty years. The user cannot be urged by the public, either as the foundation of a legal presumption of a grant and thus justify a claim by prescription, or as evidence of dedication of the premises to public use.—*Pearsall v. Post*, 111.

HUSBAND AND WIFE.

The separate estate of a *feme covert*, in the hands of trustees, is in equity chargeable with debts contracted for the benefit of the estate. So such estate is chargeable where a portion of it has been converted into other property in conformity to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property.—*Dyett v. N. A. Coal Co.*, 570.

INSURANCE.

In the insurance of a vessel on time, the warranty of sea-worthiness is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk; and the fact that she subsequently sustained damage, and was not properly re-fitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission.—*American Ins. Co. v. Ogden*, 287.

2. A defect of sea-worthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the owner or his agents, discharges the underwriter from liability for any loss, the consequence of such want of faith, prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy, and not caused or increased by such particular defect.—*Ib.*

3. The insurer is not liable either in the case of a technical total loss or actual loss, where it appears that the necessity, the *prima facie* ground of abandonment, though real, was yet the result of culpable negligence, or want of due diligence on the part of the owner or his agents.—*Ib.*

4. Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss, on the ground of the inability of the master to obtain funds to make necessary repairs, where the owner is chargeable with want of ordinary prudence in furnishing funds or credit,

and especially where he has deprived the master of the means ordinarily possessed by him to obtain funds or credit.—*Ib.*

5. In determining the right to abandon as for a technical total loss in reference to the cost of repairs, the parties, it seems, are concluded by the sum inserted in the policy as the value of the vessel, and are not allowed to give proof of its real value.—*Ib.*

PARTNERSHIP.

1. General reputation of a partnership, existing between two or more individuals, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. Whether it be admissible, even as auxiliary evidence, *quere.*—*Halliday v. McDougall*, 81.

2. Although one partner cannot bind his copartner by seal, where the effect of the instrument thus executed is to charge the firm, yet it is competent to him, by an instrument under seal, to authorize a third person to discharge a debt due to the firm.—*Wells v. Evans*, 251.

PRINCIPAL AND AGENT.

1. A contract of sale by a factor or agent, entrusted with goods for the purpose of sale, is valid, and will protect a purchaser against the principal, although no money is advanced, or negotiable instrument or other obligation given at the time of the contract; it is enough if an obligation be subsequently entered into on the faith of contract, at any time whilst it remains unrescinded: it was accordingly held in this case, that the subsequent endorsements of promissory notes, and in anticipation of which the property was transferred, gave effect to the contract.—*Jennings v. Merrill*, 9.

2. A release executed by an attorney in his own name, and not in the name of his principal by himself as attorney, is not obligatory upon the principal; and parol proof is inadmissible to show an adoption of the act, by the principal receiving the consideration of the release.—*Wells v. Evans*, 251.

SALE OF CHATTELS.

1. An auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding that the goods were sold, and the proceeds paid over to the thief without notice of the felony.—*Hoffman v. Carow*, 21.

2. The exception of sales in *market overt* which prevails in England, is not recognized here.—*Ib.*

3. Where a contract is made for the sale of an article of merchandize at a stipulated price, although the contract be void under the statute of frauds, the price agreed upon may be recovered, if the article be subsequently delivered and accepted.—*Sprague v. Blake*, 61.

4. Although by the terms of a contract an article agreed to be delivered is to be of a merchantable quality, still if an inferior article be delivered and accepted, the purchaser when called upon for payment is not entitled to a reduction from the contract price, on the ground of the inferior quality of the article; he must refuse to accept it, or if its inferiority be subsequently discovered, he must return it, or require the purchaser to take it back.—*Ib.*

5. Where goods are obtained by a purchaser by false representations as to his ability to pay, and by suppressing the truth, the vendor may rescind the sale, and after demand and refusal bring an action of trover against a sheriff who has levied upon the goods by virtue of an execution against the purchaser.—*Hitchcock v. Corvill*, 167.

6. The doctrine that possession carries with it the evidence of property, so as to protect a person acquiring property in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer.—*Saltus v. Everett*, 267.

LEGISLATION IN ILLINOIS.

The legislature of this state was convened in December last by the proclamation of the governor, and continued its session about three months, during which time several statutes, public and private, were passed. The principal object for which it was convened, was the consideration of the subject of internal improvements, and the state bank of Illinois.

Springfield, the seat of government, and Quincy, the shire town of Adams county, were created cities, and have since organized under their respective charters.

The time of holding the summer term of the supreme court was altered from July to the first Monday of June.

PUBLIC WORKS.

The offices of fund commissioners and commissioners of public works, under the statute to establish and maintain a general system of internal improvement passed February 27, 1837, were abolished, and instead thereof, new offices providing for similar duties were constituted, under the act of February 1, 1840. This provides that there shall be one fund commissioner, instead of three as before, and three commissioners of public works, instead of seven, styled the "Board of Public Works." This board was authorised to settle all debts and liabilities incurred on account of internal improvements, dispose of all state property not wanted for immediate use, protect the various public works from dilapidation or decay, take charge of such portions as may be completed under existing contracts, but was prohibited from letting any additional contract upon any railroad, turnpike road, or river.

STATE BANK.

A statute was passed January 31, 1840, reviving the charter of the state bank, which had been forfeited by reason of refusing to pay its liabilities in specie. All previous laws giving remedies for such refusal were suspended until the close of the next session of the legislature, which will be convened in course in December next. By this act, the branch at Chicago is to be removed prior to August 1st, and located at such other place as the bank may deem proper. Several stipulations, providing for a more strict accountability, and imposing salutary restraints, were made conditions of the renewal.

REPORTER OF DECISIONS.

An act, relating to the publication of the reports of the decisions of the supreme court, was passed. It provides for the distribution thereof by the secretary of state, as follows, viz. one copy to each of the judges of the supreme and circuit courts, one to the attorney general, each state's attorney, each clerk of a court of record, except the clerk of the supreme court who is to receive five copies, one to each probate justice, one to the executive of each state in the United States, five to the executive of the United States, and one copy to each of the officers of the executive departments of the state, who are required to keep their offices at the seat of government. In addition to these, one hundred copies are to be deposited in the secretary's office for the use of the state. On the delivery of these by the reporter, the secretary is directed to furnish him with a certificate thereof, and the auditor of public accounts is to "issue his warrant upon the treasury for such an amount as

said volumes shall amount to, at the price for which said books shall be sold to individuals ; provided, that said price shall not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer, and secretary of state." The reporter is understood to be J. YOUNG SCAMMON, Esq., of Chicago.

OBITUARY NOTICES.

IN Mobile, Al., HON. WILLIAM SMITH, aged 77. He was formerly for many years a senator in congress from South Carolina, and afterwards a resident of Huntsville, in Alabama. He was a staunch supporter of the doctrine of state rights, and of strict construction of the constitution of the United States. He was appointed by General Jackson, when at an advanced age, to the bench of the supreme court of the United States, which appointment he declined.

In Cincinnati, JOSEPH S. BENHAM, ESQ., aged 42. He was one of the oldest, and has been for many years one of the most distinguished and successful advocates of the Cincinnati bar. About a year since he removed to New Orleans and had already obtained a successful position in his practice at that place. With his family he was journeying north to pass the summer, and tarrying a few days with his old friends in Cincinnati, he was taken with the disease which terminated his life.

In Boston, July 14, BENJAMIN B. THATCHER, ESQ., aged 30. He was graduated at Bowdoin College in 1826, and soon after commenced the study of the law, to which profession he devoted himself until his declining health required him to leave it and make a journey to Europe. He returned home in the autumn of 1838, having derived from travelling, no material benefit to his health. Since then, he has been a constant victim to the ravages of a disease which baffled all the efforts and skill of his physicians. Mr Thatcher was more distinguished for his literary than his legal acquirements. For several years he has been a constant contributor to the periodical publications in this country, and of late he had written occasionally for some of the English Reviews. He was a man of great industry ; and his writings, although little deserving in point of style or originality, may be considered as useful additions to our literature, as the results of honest and patient investigation.

In Boston, July 22, GEORGE REED, one of the constables of the city, and long distinguished for his activity and success, as one of its police officers. Having performed his last service, and gone to make his final return, he is entitled, we think, to be mentioned with respect on the record of public opinion. He was born in Boston on the 10th of April, 1769. His parents were German emigrants, and in the year 1771, removed to Waldoboro, in Maine. George was a shipbuilder, and worked at the trade until 1796, when he was constable and collector of taxes for that town, and soon after appointed a deputy to

Edmund Bridge, Esq., sheriff of the counties of Lincoln and Kennebec. Upon the division of those counties he was made a deputy also to Gen. Arthur Lithgrow, sheriff of Kennebec. He served in both counties until 1808, when, being unable from ill health to perform the office through so wide an extent of territory, he removed to Boston, and was appointed, in 1809, one of its constables, and was continued in the same, by annual appointments, to his decease. From his shrewdness and capacity, he was, during a long course of active service, the terror of evil doers, and always employed in the detection and arrest of criminals. At the late May term of the municipal court, he served his last term, as the principal officer for the observance of order, and the performance of the active duties of that court. That an individual in his sphere, exercising a responsible trust, with which the peace and safety of society are intimately connected, should be obnoxious to bad citizens, was rather creditable to his official diligence and fidelity, than a ground of odium.

INTELLIGENCE AND MISCELLANY.

SIR EDWARD SUGDEN.

In a series of Pen and Ink Sketches of Politicians, recently published in England, some of the leading English lawyers being members of Parliament, are introduced. The freedom of language indulged in towards distinguished characters is carried to an extent which may not be approved; yet there is something exciting to find a writer in these latter days dealing with the living without fear or favor, without anger as without zeal. We have been interested in the sketcher's opinion of the advocate, legislator and lawyer, whose name is placed above. It will be recollected, that Sir Edward Sugden held the office of lord chancellor of Ireland during the short lived administration of Sir Robert Peel in 1835, by which he necessarily sacrificed his position at the head of the English chancery bar. In one hundred days the triumphant return to power of Lord Melbourne brought back Plunckett as lord chancellor of Ireland; and Sir Edward Sugden, having once sustained the dignity of judge, cannot, consistently with the long established usage in England, again descend into the arena of the bar. Sir Edward rapidly gained the first rank, and first practice, as an equity lawyer, and perhaps his emoluments were the greatest ever derived by any individual from the practice of a profession. It is said that his fees, on the last year of his practice, amounted to nineteen thousand guineas. No man at the equity bar ever enjoyed—or in truth ever deserved—a higher reputation both as lawyer and advocate. Let us look at him first in the latter capacity. He never was at any time more than he is now—a good speaker. Except great clearness of intellect, and the reasoning power in perfection, he had not a single one of those high qualifications, natural or acquired, which would go to constitute the orator. His voice is bad—his utterance slovenly—his address bad—his action ungraceful—his English vocabulary narrow, and the reverse of classical, picturesque, or powerful—his learning restricted to that of the mere dry English law, upon which he had read and profoundly meditated; with general literature, the sciences, and all manner of philosophy, he was unacquainted—he had nothing to help him except his books, his indus-

try, and the powers of his mind; with these alone, and despite the lack of the rest, he made an advocate that every suitor sought most anxiously to retain. He was not even an energetic advocate, yet he was the best that could be had, because his influence over the court was well nigh boundless. His arguments and opinions upon all points of law were considered as oracles, and delivered by him as such; he quoted his own works as *the* book on powers, *the* book on vendors and purchasers, and the like; and, with his subtle reasoning, and weighty argumentation, he entirely possessed himself of the ear, and filled to its widest grasp the mind of the judge. There was no room to admit of any of his arguments being pushed down by another lawyer—no room to handle the question at issue with effect, after any other manner than that in which he had handled it. Never was the old phrase "of laying down the law" so completely exemplified as by Mr Sugden. Lord Brougham, with his characteristic recklessness, sought when lord chancellor, to throw off what he considered the thraldom of his court. It was very amusing to witness some of the contests which took place—to mark the impotent fretfulness of interruption and of remark, and the demoniac twitching of Brougham's nose, and the impassable contempt with which the lawyer treated the judge, intimating, as plainly as measured language could, that the judge knew nothing whatsoever of the law which he sat to administer. "Yes, I have heard your lordship; but your lordship cannot be aware that the law is directly the reverse of what it should be, if there were any ground for your lordship's observation. If your lordship will look into the book on powers, you will there find that this is the law," and so forth. Brougham struggled and snorted like a stranded whale, but it was of no use, except to provoke the laughter of the bar. Even those who wrote his judgments could not sympathise with him in the unequal conflict he was ever entering on. On one occasion, however, his lordship took occasion, in a field where he dreaded no adversary, to unpack his heart, and retort upon Sugden for all his sneers, and slights, and rebukes. He took occasion to abuse him vehemently in the House of Lords; but it is not true that he compared the vexatious lawyer to a bug. The very clever passage in which the unsavory simile occurred was altogether the invention of the *Times*' reporter. Brougham was then the *Magnus Apollo* of the *Times*. The Althorpian note in which stood the dread words, "Shall we make war against the *Times*?" had not yet been picked up in fragments from the feet of the lord chancellor, and put together for the edification of his dear friends and fellow-laborers of Printing-house square. So it was thought there, as by the more violent reformers everywhere, and likewise by the many who disliked Sugden, a man never yet personally popular in any circle—"*Se non e vero e ben trovato*"—and, in sooth thought Brougham himself, and he would have fain adopted it if he dared; but to face Sugden and a justly irritated and indignant bar in the court of chancery, without first solemnly resigning all claim to the dire insult, was quite out of the question; so he denied the simile, but still he enjoyed the advantage that nobody at the time believed him. He was never famous for veracity; and it was known there were few things he would not *do*, and nothing he would not *say*, to escape a quarrel. Here his friends were satisfied he had only acted as might have been expected from him; and they nick-named his victim *Bugden*.

COLLECTANEA.

An action was recently brought in the common pleas by David Gould, of the New York bar, against Jacob Hays, the high constable of New York, for an assault and battery in violently ejecting the plaintiff from the court room during the recent trial of Justice Merritt. The plaintiff was standing in the entrance between the outer door and the iron gateway, when the defendant, without warning him to leave the passage, took hold of him by the breast, and the plaintiff told him that he was a member of the bar. To this the defendant replied, "I know you, you rascal," and pushed him violently out of the room. For the defence the recorder testified that the court had given orders that this passage should be kept cleared. The court instructed the jury, among other things, that if the plaintiff, being a member of the bar, wished to go inside the iron railing, he had a right to go there, and he should not be restricted from it. But an attorney or any other person had no right to block up the way to the court, and by doing so, prevent other spectators from hearing or seeing what was going on. If the court gave a specific order to have an individual removed from court, an officer would be justified in doing it, even with violence; but, although the court made an order to have the passage kept clear, that would not justify an officer in pushing a person out with violence, without first ordering him to leave it. The jury returned a verdict for the plaintiff for $125.—A correspondent at Quincy, Ill., under the date of June 25, writes that the superior court of that state has recently decided against the right of unnaturalized foreigners to vote, which has heretofore been exercised in that state.—The Selma Free Press announces that the supreme court of Alabama has decided in favor of the constitutionality of the "Real Estate Bank of South Alabama." The unconstitutionality of the institution was pleaded by its debtors in bar of some actions brought to recover notes which it had discounted, and the plea was sustained by the circuit court. The judges have unanimously reversed this decision, and pronounced the late law of the legislature against this and similar institutions to be unconstitutional and void—so says the Free Press.

MONTHLY LIST OF INSOLVENTS.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Adams, Charles	Shoe dealer,	Boston,	July 14.
Adams, Joseph H.	Merchant,	Boston,	July 22.
Baker, William P.	Machinest,	Boston,	July 20.
Brigham, John [*Brigham, Bull & Co.*]	Merchant,	Boston,	July 2.
Brigham, William P. [*Brigham, Bull & Co.*]	Merchant,	Boston,	July 2.
Brackett. Henry [*Henry Brackett & Co.*]		Boston,	July 25.
Bull, Trumbull [*Brigham, Bull & Co.*]	Merchant,	Boston,	July 2.
Bullard, J. E. & W. H.		Medfield,	June 20.
Christaller, Jacob M.	Trader,	Boston,	July 9.
Coffin, Langdon		Boston,	July 9.
Corthell, Isaac	Cooper,	Hingham,	July 6.
Dean, Ichabod	Yeoman,	Franklin,	March 9.
Elder, Nathaniel	Gentleman,	Worcester,	June 30.
Hodgdon, Henry B.	Trader,	Boston,	July 13.
Odiorne, George Jr.		Boston,	July 9.
Penniman, Parcell	Laborer,	Milford,	June 29.
Pratt, Caleb Jr.	Trader,	Boston,	July 18.
Ripley, William Jr.	Blacksmith,	Quincy,	June 27.
Smith, Jabez	Innholder,	Boston,	June 26.
Wentworth, Thomas M.	Baker,	Roxbury,	July 8.
Wyman, Moses	Merchant tailor,	Boston,	July 22.